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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 714

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

—v.—

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Atlantic Coast Line Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of *J. H. Hodges et al.* v. *Atlantic Coast Line R. Co.*, No. 22341 in that court, on July 13, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 238 F. Supp. 425, and appears at pp. 150-57 of the printed record before the Court of Appeals, nine copies of which we have filed.[1] The opinion of the Court of Appeals for the Fifth Circuit has been reported at 363 F.2d 354, and appears herein as Appendix A, at pp. 1a-11a. An earlier opinion in

[1] References to this printed record are hereinafter designated as "R."

this matter by the District Court is reported at 199 F. Supp. 794, and is reproduced at R. 37-44; and an earlier opinion of the Court of Appeals, on review of that decision by the District Court, is reported at 310 F.2d 438 and is reproduced herein as Appendix C, at pp. 15a-26a. The decision of the National Railroad Adjustment Board (First Division) in this matter, dated August 6, 1959, appears at R. 10-16 and appears herein as Appendix D, at pp. 27a-32a. A supplementary award of the Adjustment Board, dated January 8, 1964, appears at R. 93-100, and appears herein as Appendix E, at pp. 33a-38a.

JURISDICTION

The judgment of the Court of Appeals was dated and entered July 13, 1966. A timely petition for rehearing was denied on September 1, 1966. (Appendix B, p. 14a) A stay of the issuance of the mandate of the Court of Appeals has been granted by that court, conditioned on the filing of a petition for certiorari by October 25, 1966. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was § 3 *First* (p) of the Railway Labor Act, 45 U.S.C. § 153 *First* (p), and 28 U.S.C. § 1331 and § 1337.

QUESTION PRESENTED

Whether a federal court, when a proceeding for the enforcement of an award of the National Railroad Adjustment Board is brought before it under § 3 *First* (p) of the Railway Labor Act, is totally precluded from examining into whether there is any rational basis for that Board's refusal to consider a legal defense urged before the Board by one of the parties.

STATUTORY PROVISIONS INVOLVED

This case involves various paragraphs of § 3 *First* of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 153 *First*. The pertinent provisions are set forth as Appendix F, at pp. 39a-43a.

STATEMENT

The state court FELA suit.—In January 1956, J. H. Hodges, a trainman then employed by the present petitioner, Atlantic Coast Line Railroad Company ("Coast Line"), was injured when a freight car wheel rolled over his left foot while he was working. (R. 64) He then sued Coast Line under the FELA in a state court in Georgia, claiming a total and permanent disability "from railroading," and "further . . . from all work." (R. 68) The *ad damnum* of his complaint was in the amount of $75,000. (R. 64)

After a trial in December 1956 at which Hodges submitted medical proofs of total and permanent disability from railroading (R. 58),[2] a substantial verdict was entered in his favor.[3] (R. 51, 108) Judgment was entered on

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[2] Hodges proffered a doctor who testified that "I doubt that he [Hodges] will ever be able to return to the type railroad yard work that he once did." (R. 58). He also supported his contention with his own evidence. (R. 55) The court charged the jury on permanent disability and on the use of the mortality tables introduced by Hodges in this respect. (R. 61-63)

[3] The verdict was in the sum of $22,005. Special damages were claimed only in the amount of $432.80 (R. 68), and obviously petitioner's lost earnings for the eleven months from the accident through the date of the verdict did not account for the remainder of the verdict.

The verdict was apparently a general one, and accordingly there is no way of telling the gross value which the jury put on Hodges' permanent and total disability from railroading. (There were no

the verdict and Coast Line satisfied the judgment by payment in full on April 8, 1957. (R. 51, 108)

Not long afterwards, on September 30, 1957, Hodges alleged that he was fully able to work and requested that he be taken back to work with his old seniority.[4] (R. 5) Coast Line took the point of view that, having sought and obtained a substantial recovery on the basis that he was permanently disabled from work, Hodges had established that he was no longer entitled to employment by the railroad, and that he was estopped from taking the contrary position. (R. 11-12)

The proceedings before the Adjustment Board.—On behalf of Hodges, the union representing his craft submitted his claim for reemployment with his old seniority to the "minor dispute" procedure set up under Section 3 of the Railway Labor Act, and proceedings accordingly ensued before the National Railway Adjustment Board. In August 1959, the Adjustment Board rendered an award that if—after following a procedure for medical examination set forth in its award—it was found that Hodges was able to work on the day he applied to return to work, he

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proofs of total disability from other gainful work, of a more sedentary nature than railroading.) It may well have been substantially more than the verdict itself, inasmuch as the FELA is a comparative negligence statute; under it, where the employer's fault is found to have contributed to the plaintiff's injury, together with his own fault, the trier of facts is required to award in damages that portion of the injury suffered by plaintiff that corresponds to the degree of the railroad's fault in producing the injury. 35 Stat. 66 (1908), 45 U.S.C. § 53; *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 505-06 (1957). Indeed, it may well have been that the jury thought that Hodges' damages were the full $75,000 specified in his complaint, but that the railroad was only about 30% at fault in the accident.

[4] The Coast Line took Hodges' name off the seniority roster shortly after its payment of the judgment. (R. 33)

should be reinstated with back pay as of that date. (R. 14-16)

The Adjustment Board declined to examine the merits of Coast Line's claim of estoppel against Hodges by reason of the position he had successfully urged in obtaining his damage award in the state court. The Board's explanation was that, since the proceeding before it was being prosecuted in the name of the union and not in the name of the individual employee, the doctrine of estoppel could not be applied. (R. 13) The Board's complete discussion of this point was as follows:

> "It has been held that the same rules of res judicata and collateral estoppel apply in an administrative proceeding following a Court judgment that would apply in a second Court action between the parties, but only as to the parties to the record in the Court proceeding.
>
> "Let us keep in mind that when an employee brings a cause of action against a carrier he does so under the Federal Employer's Liability Act and the parties to that cause of action are the employee and the carrier. When a claim is presented to this board it is under the Railway Labor Act and the parties to the claim are the petitioner (the union) and the carrier. Therefore, the parties in the case before us are not the same as the parties in the Court case." (R. 13; App. D, p. 30a, *infra*)

This suit; the early proceedings.—The Coast Line declined to abide by the award of the Adjustment Board, and Hodges and the Brotherhood sued in the District Court for the Northern District of Georgia to enforce the award, as provided by Section 3 *First* (p) of the Railway Labor Act. (R. 1-9) Coast Line moved to dismiss on the

grounds that since the award was in a conditional and alternative form, it could not be enforced in court. (R. 19-20) The District Court granted that motion to dismiss. *Hodges* v. *Atlantic Coast Line R. Co.*, 199 F. Supp. 794 (N.D. Ga. 1961); R. 37-44. On appeal, commenting that there was before it "nothing but the complaint and the annexed award," and emphasizing that its decision did not and was not meant to affect any other issue in the case, the Court of Appeals for the Fifth Circuit reversed. 310 F.2d 438; App. C, pp. 15a-26a, *infra*. The Court of Appeals held that "there was an award of sufficient definiteness to invoke the aid of the District Court in its enforcement." 310 F.2d, at 443; App. C, p. 22a, *infra*. The Court of Appeals ordered the District Court to hold the case on its docket while the parties proceeded to have Hodges examined by physicians in the general form contemplated by the original award of the Adjustment Board, and while the Adjustment Board thereafter filed a further award. 310 F.2d, at 443-45; App. C, pp. 25a-26a, *infra*. After this medical examination, the Adjustment Board, without further discussion of the claim of estoppel, found that Hodges was physically able to resume work, and, on January 8, 1964, issued a supplementary award ordering his reinstatement and awarding him back pay. R. 93-99; App. E, pp. 33a-38a, *infra*.[5]

The present proceedings.—The Coast Line abided in its position that Hodges' recovery of damages for permanent disability from railroading in the FELA suit precluded his contention that he was entitled to be rehired with his full seniority, and it accordingly declined to abide by the award. (R. 36, 101-02) Hodges and the Brotherhood then amended

[5] Since the proofs were not adequate as to Hodges' condition when he sought reinstatement in 1957, and since in its view there was no proof as to his ability to work prior to January 29, 1963, the award provided for back pay only as from that date.

their complaint in the District Court to bring in the supplementary award of the Adjustment Board. (R. 88-89) Coast Line then moved for summary judgment on the basis of its contention of estoppel. (R. 111-12) Following *Jones* v. *Central of Georgia R. Co.*, 331 F.2d 649 (1964), a Fifth Circuit case directly in point, the District Court granted the motion on the grounds that Hodges was estopped from contending that he was wrongfully separated from service after he had successfully alleged and proved that he was permanently and totally disabled from railroad employment. 238 F. Supp. 425 (N.D. Ga. 1964); R. 150-57.

On appeal, the Court of Appeals observed that:

> "[W]e feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability, establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost." (363 F.2d, at 539; App. A, pp. 9a-10a, *infra*)

The Court of Appeals then indicated its disagreement with the only basis given by the Adjustment Board for its failure to apply the doctrine of estoppel, namely, the fact that the parties in the proceeding before the Adjustment Board were different from those in the state court suit: "In this case the NRAB asserts that estoppel does not apply because Hodges was not a party to the proceedings before it; the claim was prosecuted solely by the union on behalf of Hodges. However, it cannot be denied that Hodges was the real party in interest who was to profit by a favorable decision even though not a party in name. As indicated in *Gunther* [*Gunther* v. *San Diego & A.E.R. Co.*,

382 U.S. 257 (1965)], the NRAB is not bound by common law rules."[6] (363 F.2d, at 539; App. A, p. 10a, *infra*)

The Court of Appeals then proceeded to reject certain other subsidiary arguments made in behalf of the Adjustment Board's failure to consider the estoppel doctrine,[7] concluding:

> "It does seem to us that at some point in the procedure the matter of estoppel should have been considered and a decision rendered with respect to it. The NRAB did not consider it. . . ." (363 F.2d, at 539; App. A, p. 11a, *infra*)

Despite all this, the Court of Appeals proceeded to say, in its very next words:

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[6] The Court of Appeals might have added that the statute itself contemplates that the "employee" is to be in every sense a party to the grievance before the Adjustment Board. Section 3 *First* (h), (i), (j), (m), (p).

[7] The award suggested—without specifying any reason—that the proper procedure of the railroad would have been to have brought charges against Hodges seeking his discharge. (R. 14; App. D, pp. 30a-31a, *infra*) Obviously, this alternative would be meaningful only if there were some substance to the Board's view that estoppel could not be asserted in the wrongful discharge grievance because of the formal nonidentity of the parties. Coast Line pointed out, and the Court of Appeals apparently agreed, that there was no reason to bring any charges against Hodges because he knew of the facts concerning the lawsuit he had brought. The Court of Appeals appeared somewhat mystified over this argument on behalf of the award, presumably because a grievance proceeding arising out of a bringing of charges against Hodges would, similarly to the present grievance, have been prosecuted by the union, thus creating the same so-called nonidentity of parties over which the Adjustment Board bobbled.

The award also suggested that the railroad might have conditioned its payment of the FELA judgment upon a release of any rights which Hodges might have had to return to work. (R. 14; App. D, p. 31a, *infra*) But, as the Court of Appeals pointed out, the state court judgment was an absolute judgment for the payment of money and the Coast Line had no standing to require Hodges to sign any releases in order to be paid. (363 F.2d, at 539; App. A, p. 11a, *infra*)

"... and in our view, we are precluded from doing so by *Gunther*."[8] (363 F.2d, at 539; App. A, p. 11a, *infra*)

The Court of Appeals made it plain that under its own prior decision respecting the application of estoppel in this situation, *Jones* v. *Central of Georgia R. Co., supra,* as well as under certain other decisions from other Courts of Appeals,[9] there was a "cogent argument for affirmance" of the District Court's ruling. (363 F.2d, at 538; App. A, p. 9a, *infra*) —But it held squarely that the *Gunther* decision of this Court prevented this, and that it required it to order the District Court to uphold the award of the Adjustment Board regardless of the lack of rational basis for the Adjustment Board's failure to consider the estoppel argument. It accordingly reversed the judgment of the District Court, leaving open to the District Court only the question of the computation of the amount of back pay to be awarded to Hodges despite his proof of and collection of a judgment for a permanent and total disability from railroading.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, through an extravagant reading of this Court's decision in *Gunther* v. *San Diego & A.E.R. Co.*, 382 U.S. 257 (1965), has apparently abdicated any form of judicial review whatsoever over decisions of the National Railroad Adjustment Board (except with respect to the mathematics of the computation of money

[8] The decision in *Gunther* supervened after the appeal to the Fifth Circuit was initially briefed. The parties submitted short supplemental briefs on the effect of *Gunther*.

[9] The leading one is *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953).

awards). To be sure, the Court of Appeals for the Fifth Circuit, prior to the *Gunther* decision, permitted *de novo* review of the Adjustment Board's award in cases where (as in *Gunther*) the award was both for reinstatement and for back pay. See *Brotherhood of Railroad Trainmen* v. *Louisville & N.R. Co.*, 334 F.2d 79, 81 (5th Cir. 1964), *cert. denied*, 379 U.S. 934 (1964). While such an approach could not survive the *Gunther* decision, the present ruling by the Court of Appeals appears to have taken an equally erroneous polar position—that decisions of the Adjustment Board are completely immune from judicial review, and that the only duty of a federal district court when a proceeding to enforce such an award is before it is automatically to enforce it, subject to a recomputation simply of the monetary damages provided in the award.

This decision is so contrary to the normal course of judicial proceedings as to warrant the intervention of this Court's reviewing powers. The federal courts are certainly no more rubber stamps for administrative tribunals than they are for Congress. *Cf. Flaxer* v. *United States;* 358 U.S. 147, 151 (1958). Despite statutory language that may state that an award or other order of an administrative body is "final and binding," the normal rule is that there will be some degree of judicial review of the adjudication of an administrative agency. See *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1902); *United States* v. *Williams,* 278 U.S. 255 (1929); *Bridges* v. *Wixon,* 326 U.S. 135 (1945); *Estep* v. *United States,* 327 U.S. 114 (1946); *United States* v. *ICC,* 337 U.S. 426, 433-34 (1949); *Hiatt* v. *Compagna,* 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court,* 340 U.S. 880 (1950); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *Blanchard Machine Co.* v.

RFC, 177 F.2d 727 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 912 (1949). This is particularly the case when enforcement of an agency's orders is sought in a federal court under a statutory provision expressly providing for enforcement through judicial proceedings. See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944); 3 Davis, *Administrative Law Treatise* (1958), pp. 319-23. The Court of Appeals here apparently overlooked this principle and held that since the District Court could not *de novo* try the facts in the dispute, it could not refuse to give effect to the Adjustment Board's award no matter how arbitrary and baseless in reason it was, even as to a matter of law.

This was plain error of a sort which this Court should not allow to stand as a precedent. In the *Gunther* case itself, before ordering the Adjustment Board's order enforced, this Court took pains to observe that it could not "be said that the Board's interpretation was wholly baseless and completely without reason." 382 U.S., at 261. All the Court held in *Gunther* was that the practice of the lower federal courts there,[10] of providing a trial *de novo* of the Adjustment Board's findings—"open[ing] up the Board's finding on the merits"—was erroneous. 382 U.S., at 263. In other words, although there can be no trial *de novo*, and although it even may be that review of the Adjustment Board's awards should be carried out under even a more restricted standard than that prevailing as to the orders of other administrative agencies, the normal principle of some judicial review to insure that there is a basis in fact for the Board's award remains. The Court of Appeals' opinion obviously does not recognize any such room left for the judicial function. The Adjustment

[10] Similar to the prior procedure of the Fifth Circuit. See pp. 9-10, *supra*.

Board's action in refusing to consider the estoppel defense is clearly totally baseless in reason; the Court of Appeals clearly recognized it as such; the Court of Appeals apparently recognized that this sort of estoppel has been recognized as a complete defense as a matter of law;[11] and yet the Court of Appeals expressed itself as without power to deal with the matter and do otherwise than order the entry of a judgment enforcing the award.

The National Railroad Adjustment Board is a public administrative agency, not a private consensual arbitration tribunal; Congress "intended the Board to be and to act as a public agency, not as a private go-between." *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 695 (1963).[12] —But in any event, even if the analogy to arbitration which is often drawn[13] as to the nature of the function of the Adjustment Board under Section 3 of the Railway Labor Act is to be taken

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[11] The defense is uniformly held available on summary judgment and without regard to the actual physical condition of the ex-employee who has collected his verdict. See *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953); *Chavira* v. *Southern Pac. Co.*, 187 F. Supp. 251 (N.D. Cal. 1960); *Ellera* v. *Southern Pac. Co.*, 191 F. Supp. 716, 722 (N.D. Ill. 1961); *Alcorn* v. *Missouri-Kansas-Texas R. Co.*, 88 F. Supp. 471, 472 (W.D. Mo. 1950); *Buberl* v. *Southern Pacific Co.*, 94 F. Supp. 11, 12 (N.D. Cal. 1950); *New York Cent. R. Co.* v. *Rials*, E.D. Ill. Civil No. 5021, July 7, 1964 (R. 132-39).

[12] Indeed, in the *Machinists* case, this Court so stated as to an airline system board of adjustment, created by private agreement under § 204 of the Railway Labor Act, which provides that these system boards shall have functions analogous to those exercised in the rail industry by the NRAB under § 3 *First*. Obviously, the case of the permanent statutory NRAB expressly constituted by § 3 *First* is an *a fortiori* one.

[13] See *Gunther* v. *San Diego & A.E.R.Co.*, *supra*, 382 U.S., at 263-64; *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.Co.*, 373 U.S. 33, 40 (1963).

as indicating that a more minimal standard of review should be applied by the courts than is ordinarily the case with administrative findings, the fact remains that even judged by the standards of an arbitration award, an action such as the Adjustment Board's arbitrary refusal to apply, and disregard of, the doctrine of collateral estoppel, would be reversible by a court reviewing the award. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960);[14] *San Martine Cia.* v. *Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) ("manifest disregard of the law"); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948). Moreover, whether one labels the Adjustment Board as "agency" or "arbitrator," it might well be appropriate to pay greater deference to certain aspects of the Adjustment Board's award—like those involving the interpretation of the collective bargaining agreement, with which this Court dealt in *Gunther*—than to other points, such as the issue of law which is presented here. *Cf. United Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* Indeed, this issue, with its overtones of preserving the integrity of the administration of justice in the courts through the prevention of a party's collecting twice on inconsistent claims[15] is particularly appropriate for at least some measure of judicial review. Certainly on the question whether the Coast Line's estoppel defense

[14] ". . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." 363 U.S., at 597. —The Board's basis here for rejecting the estoppel defense had nothing to do with the agreement, but rather related only to its notion as to the requirements of the identity of parties.

[15] Since reinstatement awards characteristically also include back pay at the full rate, and since in these cases by definition the employee has collected a capital-sum award for the permanent total or partial loss of his earning power, it is evident that the effect of not applying the estoppel doctrine is to make the railroad com-

could be considered, the Board has no particular expertise; and a function for the reviewing court as the guardian of fair procedure here would appear to be warranted.—In any event, the point remains that regardless of what the precise standard of judicial review may be, if there is any degree of judicial review at all, the action of the Adjustment Board here was obviously subject to being set aside.[16] The decision of the Court of Appeals to the effect that it could not be set aside should be reviewed; on that review we would propose to brief to this Court our views as to the proper standard.

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pensate the employee twice for his loss of earnings. The Third Circuit once aptly characterized the reason why estoppel is applied in these circumstances as the prevention of "that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." *Scarano* v. *Central R. Co. of New Jersey, supra,* 203 F.2d, at 513. Obviously, while styled "estoppel" the doctrine also contains aspects of the defenses of *res judicata* and of payment.

The early decisions of this Court on the principle of estoppel are revealing. In *Davis* v. *Wakelee,* 156 U.S. 680, 689 (1895), this Court declared: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." See also *Ohio & M.R. Co.* v. *McCarthy,* 96 U.S. 258, 268 (1878).

[16] Indeed, serious claims of constitutional rank would be raised if it were held that the courts had no power to do otherwise than enforce an award of a public agency, like the NRAB, which was completely arbitrary and without basis in reason, at least in a case where a party was compelled to resort to it. See *Washington Terminal Co.* v. *Boswell,* 124 F.2d 235, 244-45 (D.C. Cir. 1941), *aff'd by an equally divided Court,* 319 U.S. 732 (1943); *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). This would appear to be particularly the case where the administrative agency, as here, through an arbitrary means deprived a party of the procedural right to have a meritorious defense considered on the merits. See *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). Cases where the party had an alternative remedy in court, and chose not to pursue it, stand on a different footing. Cf. *Union Pacific R. Co.* v. *Price,* 360 U.S. 601, 607 n. 6 (1959).

2. The ruling of the Court of Appeals is obviously an important interpretation of this Court's decision in *Gunther* that will have widespread effects whether or not other circuits follow it,[17] particularly in view of the liberal venue provisions for the enforcement of Adjustment Board awards.[18] The National Railroad Adjustment Board disposes of close to 2000 cases each year.[19] The ruling below, to the apparent effect that even though the Adjustment Board's decisions in these cases turn on legal points for which there is no rational support, they must be enforced by the courts, will stand in the Fifth Circuit, and may be followed in other circuits, as a guiding principle in enforcement proceedings under Section 3 *First* (p) of the Railway Labor Act in the District Courts. The far-reaching scope of the ruling hardly needs elaboration.

Indeed, even if somehow restricted to the availability of the estoppel defense itself,[20] it appears that the question here is a recurring one. The "miraculous recovery" story of respondent here occurs with such discouraging frequency as to invite cynicism. There are a considerable number of reported cases, both court and Board decisions, relating to the employee's claim of sudden recovery which involve the

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[17] Indeed, one other Court of Appeals has already indicated in dictum that it also believes that *Gunther* means that awards of the Adjustment Board are "not within the ambit of judicial review." *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 532 (3d Cir. 1966).

[18] Under § 3 *First* (p), such suits may be brought not only in the district of residence of the employee, but in any district "through which the carrier operates." The provisions for venue in suits under the new § 3 *First* (q) of the Act, as recently added, to set aside orders of the Adjustment Board denying grievances, are similarly broad. See pp. 16-18, *infra;* App. F, p. 42a, *infra.*

[19] National Mediation Board, Annual Report (Including Report of National Railroad Adjustment Board) (1965), p. 76.

[20] Or even if the issue were restricted to wrongful discharge cases; there are about 200 of these per year, based upon our survey of Awards of various Divisions in the period 1963-66.

issue of estoppel through the prior successful maintenance of a personal injury claim for permanent and total disability.[21] Even if it were possible—which it is not—to confine the effect of the decision below to this category of cases, it would thus be of more than passing importance. But, as we have indicated, the decision below is clearly based on a general assumption that there is no room left for even a minimal review of Adjustment Board decisions to determine whether they have a rational basis.

3. The recent amendment by Congress (Pub. L. 89-456, 80 Stat. 208, June 20, 1966) of certain of the provisions of Section 3 *First* of the Railway Labor Act adds importance to the question presented.[22] In Section 2(e) of Public Law 89-456, Congress added a new Section 3 *First* (q) to the Railway Labor Act which has as its purpose the providing of a statutory review procedure for an Adjustment Board order which denies an employee grievance, thus changing the rule of *Union Pacific R. Co.* v. *Price,* 360 U.S. 601 (1959), to the effect that such awards were not subject to judicial review. See S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3; H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), pp. 14-15. Thus the Court of Appeals' approach will from now on affect not only attempts by carriers to challenge Board awards in favor of employees by resisting enforcement proceedings under Section 3 *First* (p) of the Act, but it will affect employee actions seeking review of

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[21] Besides the court cases which are referred to at pp. 7, 9 n. 9, and 12 n. 11, *supra,* the estoppel doctrine has been recognized in Adjustment Board awards. See, *e.g., A. J. Dalbo and Southern Pacific Co.,* 1st Div. NRAB, Award No. 16819, November 18, 1954; *Richard Gammon and Central of Georgia R. Co.,* 1st Div. NRAB, Award No. 6479, February 17, 1942; *B. H. Simms and Atlantic Coast Line R. Co.,* 2d Div. NRAB, Award No. 1297, February 24, 1949.

[22] In Appendix F we set forth the statutory provisions in composite form to show the amendment's effect.

adverse decisions of the Board under the new Section 3 *First* (q).[23]

Moreover, the legislative history of the new amendment not only indicates that the question implicit in the Court of Appeals' action here will remain as a problem under the amended Act, but that the Court of Appeals' conclusion of total nonreviewability of Board awards even where they are without basis in reason is incorrect. To be sure, Public Law 89-456 both added to Section 3 *First* (p), and included in the new Section 3 *First* (q), an express provision to the effect that the award of the Board may be set aside "for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the

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[23] Certainly nothing in the amendments to the Act negates the significance for the future of the ruling of the Court of Appeals. The decision of this Court in the *Gunther* case, to which the Fifth Circuit overreacted, was essentially an interpretation of the provisions of § 3 *First* (m) to the effect that Adjustment Board awards "shall be final and binding upon both parties to the dispute except in so far as they shall contain a money award." See 382 U.S., at 263. The point of the decision in *Gunther* was that the exception for money awards did not relate to any award which happens to contain a provision for money damages, but simply to the monetary aspects of those awards. The only change which Public Law 89-456 made in § 3 *First* (m) was to strike out the words "except in so far as they shall contain a money award." Obviously this does not affect the problem in a case like the one at bar, where the controversial provisions of the award relate to a matter which under *Gunther* was not within the repealed exception to § 3 *First* (m) in any event.

Public Law 89-456 also rectified the apparent contradiction between the provision of § 3 *First* (m) to the effect that awards should be "final and binding upon both parties" and the former provision of § 3 *First* (p) to the effect that the order of the Adjustment Board "shall be prima facie evidence of the facts therein stated", by amending the latter language to make it read "shall be conclusive upon the parties." See App. F, p. 42a, *infra*. But this Court in *Gunther* had made it clear that the provision of § 3 *First* (m) was the controlling one in any event.

division making the order." But the Senate Labor and Public Welfare Committee Report makes it plain that even in the absence of any express language the Committee was also of the view that, under the then-existing law and the law as to be amended by the proposal, the federal courts would not have to enforce an award which was without rational basis. For the Committee stated that it had acted[24] "on the assumption that a federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or in fact, and the Committee intends that, under this bill, the courts will have that power." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3.

Thus, not only does the Court of Appeals' holding that the courts are without power to decline enforcement of the award—even where the Board, without any rational basis, declined to consider a matter which would have afforded a defense to one of the parties—threaten to stand as a limitation on the rights to judicial review of both carriers and employees under the amended Act; it also contradicts the express views of the cognizant Committee of Congress[25] as

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[24] The context of the Committee's remark was the following: The Committee had considered a proposal that the bill be amended to include as an express ground "for setting aside an award 'arbitrariness or capriciousness' on the part of the Board." The Committee stated that it decided not to accept this amendment because it might be construed as providing for what would be in practice *de novo* review: "The Committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3. The Committee then stated that "this was done on the assumption" quoted in the text above. *Ibid.*

[25] While the House Committee Report stresses the limitations on judicial review, it was written before *Gunther* and essentially relates to the bill's function—largely made moot by *Gunther*, see p. 17 n. 23, *supra*—of negating the *de novo* review doctrine. H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), pp. 3, 15, 17.

to the scope of judicial review in the court proceedings contemplated by Section 3 *First* of the Act. Clearly this conflict underscores the extraordinary character of the holding of the court below, and indicates the necessity of review by this Court.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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October, 1966

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APPENDIX A

Opinion of the Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22341

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,
Appellants,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

(July 13, 1966.)

Before GEWIN and BELL, Circuit Judges, and HUGHES, District Judge.

GEWIN, Circuit Judge: This is an appeal by J. H. Hodges and Brotherhood of Railroad Trainmen (Union) from a summary judgment granted in favor of the Atlantic Coast Line Railroad (Railroad) by the United States District Court for the Northern District of Georgia. The case originated in a dispute between the employee Hodges, the employer Railroad and the employee's union. Although the

procedural facets of the case are somewhat involved, the facts themselves are relatively uncomplicated and may be stated in abridged form.

On the evening of January 6, 1955, Hodges, a trainman employed by the Railroad, was injured when a freight car wheel rolled over his left foot while in the performance of his duties in the railroad yards at Prairie Junction, Florida. Shortly thereafter, he instituted suit against the Railroad under the Federal Employers Liability Act in the Superior Court of Fulton County, Georgia, for $75,000 in damages, claiming the Railroad's negligence caused his injuries. Included in his complaint in the state trial court is the following salient allegation:

> "21. That petitioner by reason of the injuries which he has received is totally and permanently disabled from railroading and further was totally and permanently disabled from all work from January 6, 1955, the date of his injuries, through the date of filing this petition and said disability will continue in the future, the exact duration of which petitioner cannot now state."

In addition to the above allegation, Hodges also sought to recover loss of earnings and medical expenses past, present and future. After a trial by jury, a verdict was returned in his favor for $22,005.28 in December, 1956. Judgment was entered thereon and payment in full was made by the Railroad on April 8, 1957. On April 29, 1957, Hodges was relieved of his rule book and switch-key, and his name was stricken from the Railroad's seniority list. Upon protesting his removal from the seniority roster, Hodges was advised that since he had established his inability to perform his job, the Railroad was under no further obligation

to offer him employment consistent with the collective bargaining agreement.

At this point, the Union protested the Railroad's action and in September 1957, Hodges presented a report to the Railroad from a Tampa, Florida, physician in which the doctor advised that Hodges' foot was not then disabling and he could be employed at any work he desired to do. Hodges requested a like examination by a railroad physician, which was refused. The Union then interposed a request for a Board of three doctors to be impaneled to examine and pass upon his physical fitness. The Railroad again refused on the ground that where an employee alleges permanent disability, files suit, obtains and collects a judgment based on that contention, he has, by that fact, established that he is permanently disabled and therefore it was under no obligation to retain him in its service.

Thereafter, the Union presented Hodges' claim to the National Railroad Adjustment Board under the provisions of the Railway Labor Act, 45 U.S.C.A. § 151 et seq. The cornerstone of this claim was for reinstatement and pay for all time lost from September 30, 1957, to the date of restoration and was based on the contention that Hodges was wrongfully withheld from service in violation of the contract between the Railroad and the Union. The Railroad urged that Hodges was estopped to have his claim presented by the Union because of the position he assumed at the trial of the damage suit relative to his disability.

After an appropriate hearing the National Railroad Adjustment Board held in its Award No. 19287 that:

> (1) the doctrine of estoppel applied only to the parties of record in the prior suit, and refused to apply estoppel because Hodges was not a party to the proceedings before the Board and the parties presently

before it (the Union and the Railroad) were not the same as the parties to the damage suit;

(2) Hodges was wrongfully withheld from service, in violation of the Contract between the Union and the Railroad; and

(3) Hodges should be examined by three physicians and the decision of the majority would be binding on the parties, and if he was able to return to work on October 21, 1957, he should be reinstated with back pay from that date.

The Railroad refused to comply with the above Award and in July 1961, the present suit was filed to enforce it. The Railroad filed its answer contending: (1) that Hodges was estopped by his permanent disability suit in the state court from seeking reinstatement as an employee; and (2) that the Award of the NRAB was not final. Accompanying this answer, the Railroad filed a motion to dismiss on the finality issue. The motion was sustained by the District Court and the case was dismissed.

Thereupon, Hodges appealed to this Court, *Hodges v. Atlantic Coast Line Railroad Co.*, 310 F.2d 438 (1962), and we reversed and remanded for further proceedings to allow Hodges to have a physical examination by a board of physicians to ascertain his fitness for re-employment. In accordance with the mandate of this Court, the District Court remanded the case to the NRAB in order that the physical examination could be made, and for a determination by the Board of an appropriate award. An examination was made as directed and Hodges was found to have sufficiently recovered and able to return to work as of January 29, 1963, as determined in Award No. 20389 of the NRAB.

The original complaint in the District Court was then amended to incorporate therein this second Award. Again, the Railroad filed responsive pleadings contending that Hodges was estopped as a matter of law from asserting any claim for reinstatement. The Railroad filed a Motion for Summary Judgment in its favor and the District Court granted the motion. The case thus comes to us a second time.

Succinctly stated, Hodges and the Union make the following two contentions on this appeal:

(1) The award ordering Hodges' reinstatement is final and binding and cannot be reviewed on its merits by the district court; the only part therein subject to review is the money award.

(2) Since the award is based on a breach of contract between the Union and the Railroad the doctrine of estoppel does not apply.

They rely heavily on the recent Supreme Court case of *Gunther v. San Diego, Arizona Eastern R. Co.*, ... U.S. ....., 15 L.ed.2d 308 (1965), to sustain their position. A careful and cautious study of the record and briefs convinces us that the *Gunther* ruling requires a reversal of the holding of the District Court, notwithstanding former decisions of this Court.

The petitioner in *Gunther* worked as a fireman and locomotive engineer for the respondent railroad for 38 years and was removed from active service after his seventy-first birthday because of an alleged physical disability unconnected with any prior litigation involving an injury to him as a result of the railroad's negligent conduct. Being unable to satisfy the railroad of his physical fitness, despite a conflict in diagnosis, Gunther requested, as in the case

at bar, the selection of a three-doctor Board to re-examine his physical qualifications. This request was refused by the railroad. He then filed a claim for reinstatement and back pay with the NRAB. The Board ordered a re-examination by three physicians and upon completion of this examination and based thereon, the Board decided that the railroad had been wrong in disqualifying petitioner for service and sustained his claim for reinstatement and back pay. The railroad refused and after trial in the District Court, the award was held erroneous on the theory that there were no express or implied provisions in the collective bargaining contract which in the court's judgment limited in any way the railroad's absolute right, absent such a provision, to remove petitioner from active service upon the good faith advice of the railroad's physician, 192 F. Supp. 882, 198 F. Supp. 402. The Court of Appeals for the Ninth Circuit affirmed, 336 F.2d 543.

The Supreme Court granted certiorari and reversed on the ground that both the District Court and the Court of Appeals ". . . went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement." Speaking through Mr. Justice Black the court stated:

> "This Court has said that the Railway Labor Act's 'provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field.'"

In support of this statement the Court cited the case of *Brotherhood of Railroad Trainmen, et al. v. Chicago River and Indiana R. Cos.*, 353 U.S. 31, 1 L.ed.2d 622, 77 S.Ct. 635 (1957), which gives, among other things, the history and congressional comment surrounding the genesis of the

National Railroad Adjustment Board. On the issue of the finality and conclusiveness of the award by the NRAB on the merits of the wrongful removal issue, *Gunther* holds:

> "III. Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award.' 48 Stat. 1191, 45 U.S.C. § 153(m). The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is twofold consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's *findings on the merits* that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot." (Emphasis added)
>
> • • •
>
> "The basic grievance here—the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been *finally, completely,* and *irrevocably* settled by the Adjustment Board's decision. Consequently, the *merits of the wrongful removal issue* as decided by the Adjustment Board *must be accepted* by the District Court." (Emphasis added)

The Railroad urgently insists that the *Gunther* case is factually distinguishable from the instant case, that the problem therein presented is not comparable to the problem here, and considering the equities involved is not applicable to this case. We recognize that there are factual distinctions. The question of estoppel did not arise in *Gunther* and the decision related to contract and grievance matters.

However, it is our definite conclusion that its rationale and specific holding relate precisely to the issues now before us and are dispositive of them.

In the case at bar, in Award No. 19278, Referee Roberts found that there was an agreement between the Railroad and the Union which provided, in part, that:

> "(a) A Trainman will not be discharged without an investigation." (Art. 31)

The Board further found that there had been no proper investigation regarding Hodges' physical ability to perform his duties in 1957, at the time the carrier removed his name from the seniority roster. A pertinent portion of Award No. 19278 in this regard is as follows:

> "As it is, the *only* issue we have to decide is whether the provisions of the agreement between the union and the carrier were violated and we must find that they were." (Emphasis added)

Having found that the collective bargaining contract rights had been violated, the Board in its Award No. 20389, made a supplemental determination that:

> "(1) Claimant is able to resume his duties.
>
> (2) The medical evidence indicates that he should have been restored to service no later than January 29, 1963.
>
> (3) He shall be paid for all time lost since January 29, 1963."

The Railroad, with evident complete candor, attempts to dilute both the Award of the NRAB and the teachings of *Gunther* with the persuasive contention that Hodges is not "physically able" to be re-employed because his plead-

ings and proof in the initial state court damage suit were couched in terms of total disability and based thereon a substantial judgment was obtained and collected. Thus, the Railroad argues, Hodges is forever precluded from asserting that he has "recovered" from his injuries because of his prior inconsistent position, pleadings, proof, and fully collected judgment in the state court of Georgia under the FELA statute.

To sustain its estoppel argument, the Railroad relies on *Scarno* [sic] *v. Central R. Co. of New Jersey,* 203 F.2d 510 (3 Cir. 1953); *Jones v. Central of Georgia Railroad,* 331 F.2d 649 (5 Cir. 1964); *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.,* 334 F.2d 79 (5 Cir. 1964), cert. den. 13 L.ed.2d 344, Reh. den. 13 L.ed.2d 579; and other similar cases. These cases present a cogent argument for affirmance were it not for the *Gunther* decision. In our view, *Gunther* necessarily precludes our determination of the disability issue raised by the Railroad which, in turn, precludes the analogous estoppel argument. To the extent that our decisions in *Jones* and *Brotherhood of Railroad Trainmen—L & N* (and numerous cases from other Circuits and District Courts) hold that the District Court can review a non-monetary award of the NRAB, they have been superseded by *Gunther.* Obviously, our decisions and the decision of the District Court relying thereon were rendered before the decision in *Gunther.*

In a case of this dimension, perfect justice, as always, is an illusory concept. Viable equities exist on both sides, and it is the duty of a court of justice, insofar as humanly possible, to find a just and proper balance and reach a result which will do minimal violence to existing concepts.

Without passing on the issue of estoppel, we feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming

permanent and total disability establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost. The NRAB asserts that it recognizes and applies estoppel in appropriate cases, and that it has no sympathy for an employee who, by taking inconsistent positions, undertakes to collect twice for the same claim.[1]

In this case the NRAB asserts that estoppel does not apply because Hodges was not a party to the proceedings before it; the claim was prosecuted solely by the Union on behalf of Hodges. However, it cannot be denied that Hodges was the real party in interest who was to profit by a favorable decision even though not a party in name. As indicated in *Gunther,* the NRAB is not bound by common law rules.[2]

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[1] The following is from Award 19287:

"It has been held that the same rules of res judicata and collateral estoppel apply in an administrative proceeding following a court judgment that would apply in a second Court action between the parties, but only as to the parties to the record in the Court proceeding."

* * *

"This is not to say that we have any sympathy for an employe who offers proof to support one position on one occasion and seeks to contradict himself in making a second claim against the same adversary. Nor is it to say that we lack sympathy for the doctrine of estoppel."

[2] The following quotations are from the *Gunther* opinion:

"Paying strict attention only to the bare words of the contract and *invoking old common-law rules for the interpretation of private employment contracts,* the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians." (Emphasis added)

* * *

"The Adjustment Board, of course, *is not limited to common-law rules of evidence in obtaining information.*" (Emphasis added)

The award also states that the carrier should have brought charges against Hodges in accordance with the collective bargaining contract, made its allegations of estoppel, granted a hearing and established a proper record. Then, it says, the matter of estoppel would properly have been presented to it. The Railroad answers that any charges other than its contention with respect to the damage suit would have been "trumped up," and the facts with respect to the lawsuit were fully known by Hodges and the Union. As an alternative procedure the Award suggests that the Railroad could have made a stipulation at the time of the payment of the judgment which would have foreclosed the claimant's right to return to work. It should be noted, however, that the state court judgment was not conditional and it is doubtful that the Railroad would have had the right to attach a stipulation or condition to its payment and satisfaction. It does seem to us that at some point in the procedure the matter of estoppel should have been considered and a decision rendered with respect to it. The NRAB did not consider it, and in our view, we are precluded from doing so by *Gunther*.

We hold that the District Court committed error in granting the motion of the Railroad for summary judgment. The Award of the NRAB must stand as the result of "compulsory arbitration in this limited field," and it must be enforced.

There only remains the question of further proceedings with reference to the monetary award due Mr. Hodges as back pay from January 29, 1963. The District Court has authority under the Railway Labor Act to determine the amount of that award as stated in Subdivision IV of the *Gunther* opinion.

The case is REVERSED and REMANDED to the District Court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

Judgment, and Order Denying Rehearing, Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22341

D. C. Docket No. 582—Civil Action

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Appellants,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before:

GEWIN and BELL, *Circuit Judges,* and
HUGHES, *District Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Atlantic Coast Line Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 13, 1966

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22,341

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Appellants,

VS.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(September 1, 1966)

ON PETITION FOR REHEARING

Before:

GEWIN and BELL, *Circuit Judges,* and
HUGHES, *District Judge.*

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and the same hereby is DENIED.

APPENDIX C

Opinion of the Court of Appeals in this Case Upon Earlier Appeal—November 30, 1962

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19496

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,

Appellants,

versus

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(November 30, 1962)

Before:

TUTTLE, *Chief Judge,* BROWN, *Circuit Judge,* and JOHNSON, *District Judge.*

BROWN, *Circuit Judge*: This appeal presents the problem of the enforceability of an award of the Railway Adjustment Board. The District Court never got to the intrinsic correctness of the award. The Court, sustaining a motion to dismiss the complaint which incorporated the

award as an annexed exhibit, held that the award was in the alternative and was therefore too vague to be final and enforceable. We disagree in the main and reverse. In analyzing the matter against the successful motion to dismiss, we have had nothing but the complaint and the annexed award. We emphasize this at the outset so that when and as hearings are later held to enforce the ultimate award, nothing said, or unsaid, by us here will be interpreted as a declaration as to what the facts are or the nature of the relief, if any, to which the Employee is entitled.

The controversy is the familiar case for reinstatement of the Employee to his former position as trainman for the Carrier. Of course, as a part of the relief sought, the Employee claims back wages. But the gist of the grievance is that he was wrongfully deprived of his seniority and employment rights in April 1957. He expressly chooses not to accept this. On the contrary he expressly seeks reinstatement. This presupposes the continuation of the status of employment. Hence, the claim was the classic one for exclusive primary jurisdiction of the Railway Adjustment Board. *Pennsylvania R.R. v. Day*, 1959, 360 U. S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; *Slocum v. Delaware, L. & W. R.R.*, 1950, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; *Order of Ry. Conductors v. Southern Ry.*, 1950, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811. It was not a *Moore*-type suit seeking merely a money judgment for damages for wrongful discharge on the assumption that the status of employment no longer existed. *Moore v. Illinois Central R.R.*, 1941, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089; *Cook v. Missouri Pacific R.R.*, 5 Cir., 1959, 263 F. 2d 954; cf. *Union Pacific R.R. v. Price*, 1959, 360 U. S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460.

The grievance grows out of the fact that in late 1956 the Employee obtained a judgment against the Carrier for approximately $22,000 on an FELA claim for injury to his left foot which, by allegation and medical testimony in that suit, was described variously as a substantial, if not total, permanent disability. The carrier, accepting the verdict and judgment which it paid, presumably thought that it could then take the Employee at his own word especially since this was fortified at least to the extent of some $22,000 by the jury in that damage suit. Consequently, on April 29, 1957, the Carrier without further notice, the service of any charges or any investigation or hearings thereon as required by the collective bargaining contract,[1] relieved the Employee of his rule book and switch key and removed him from the seniority roster. There is quibbling over whether this was a "discharge." But that does not matter. We accept it as true that this action effectively denied the Employee of his former work and pay.

In the administrative handling of the controversy through the hierarchal steps of the grievance machinery, the Employee relied on, and strongly pressed, a medical report which stated that he "should be employable at any work he wants to do, the foot at the present time is not disabling to him in any way." Likewise undisputed at this time is the assertion that the Employee applied to the Carrier for a physical examination by a company physician. The Union representative requested the Carrier to set up a Board of three doctors to determine the Employee's physical condition. The Carrier denied all of these requests. This was, of course, consistent with the position vigorously taken by it in the proceedings before the Ad-

[1] Article 31 of the contract provided in part:

"(a) A trainman will not be discharged without an investigation."

justment Board. It was the simple, but forthright, contention that while an employee must be free to pursue FELA rights without subsequent recriminatory reprisals, the "carrier is under no compulsion to retain him in the service" when the employee alleges and successfully maintains in such suit that he was permanently disabled. This was restated in terms comparable to res judicata or collateral estoppel.[2]

The precise point determined by the Adjustment Board was that when the Carrier removed the Employee summarily from the seniority roster without notice, hearing or determination of his contemporary physical capacity, it violated the contract prohibiting a discharge without an investigation (see note 1, supra). The Board's decision pointed out that had the Carrier followed the prescribed investigation route, there would have been a determination—one way or the other—on the implied charge of physical incapacity. This, the Board stated, would have presented quite a different case for adjudication by it. As it was, so the Board held, the Carrier had discharged the Employee without complying with the contract.

The Carrier does not seem to deny that upon such a conclusion, the Board could order reinstatement. But the Adjustment Board did not do this. Rather, it apparently approached the case as though the intrinsic merits of the discharge were before it so that the question of actual physical fitness as of October 21, 1957,[3] was pertinent. Conse-

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[2] The award quoted this contention of the Carrier:

> "Once an employee has obtained judgment from his employer in the Courts by offering sworn testimony to support his initial position, it is not feasible that he should again be permitted to appear before another tribunal with statement which contradicts his original position for the purpose of establishing against his employer a second claim. The employer is thereby subjected to double jeopardy."

[3] This date is presumably fixed as of the time the Employee made formal demand for reinstatement.

quently, it entered a conditional award requiring reinstatement with back pay if—and the if was significant—the Employee was "able to return to work" on that date. The order then prescribed the steps to which the Carrier here, and below, urged such vigorous opposition. To determine physical capacity, the Board, in effect, ordered a medical compulsory arbitration.[4]

The complaint filed by the Employee in the District Court seeks enforcement of this award including, specifically, the issuance of the necessary mandatory orders requiring the Carrier to take the steps required of it in carrying out the medical examination and reports. The complaint makes clear, and it is not disputed, that the Carrier refused to comply with the award. Indeed, it filed a motion to dismiss for lack of jurisdiction "in that the purported award is not an award as required by the "Railway Labor Act since it is not final because it "is in the alternative. It neither sustains nor denies the claim alleged by the * * * " Employee. The District Judge in a memorandum

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[4] The Adjustment Board's order states:

"Having found that claimant was wrongfully withheld from service in violation of specific provisions of the agreement between the carrier and the union, we further find that claimant is entitled to an examination by the carrier's examining physician to determine whether he is physically able to return to work; that if said physician finds he is unable to return to work claimant may, if he chooses, engage his own physician, and if the latter finds he is able to work, he (claimant's physician) and the carrier's physician shall agree upon a third physician to examine claimant, and the decision of a majority of said physicians as to claimant's ability to return to work shall be binding on the parties hereto. We further find that said physician or physicians shall, if he or they can, determine whether claimant was able to return to work on October 21, 1957, and if he or they find he was able to return to work on said date, he shall receive such earnings as he would have received had he been allowed to return to work on said date."

The formal award terminates with the following:

"Award: Sustained as per findings hereinabove."

order held that the purported award "is in the alternative. It neither denies nor sustains the claim alleged by the plaintiff." Therefore, he concluded, there is a lack of jurisdiction since there "is not an award as required by the Railway Labor Act * * *," and "the conditions precedent to jurisdiction do not exist." On this the Court ordered that the Carrier's "motion to dismiss is sustained, and the case will be dismissed without prejudice to the plaintiff to take further action to have an appropriate award rendered by the * * * Adjustment Board."

At the outset we think it is not appropriate to speak of this in terms of jurisdiction. The statute specifically charges the District Court with the duty to hear and determine suits to compel compliance with an award of the Adjustment Board.[5] That contemplates, of course, that the Court will compel enforcement only if such awards are in accordance with controlling law. If a purported award does not meet these standards, either because of its intrinsic holdings, or because of an impermissible conditional alternative form in which it is cast, the Court may not, and should not, order compliance with it. But this is because the award is not legally acceptable, not because the Court lacks power.

Of course it must be an "award" and not a mere interim order made in the course of a hearing having no dispositive

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[5] 45 USCA § 153 First (p): "If a carrier does not comply with an order of * * * the Adjustment Board * * * the petitioner, * * * may file in the District Court of the United States for the district in which he resides * * * a petition setting forth briefly the causes for which he claims relief, and the order of the * * * Adjustment Board * * *. Such suit * * * shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of * * * the Adjustment Board shall be prima facie evidence of the facts therein stated * * * If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as * * * costs of the suit. The district courts are empowered * * * to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of * * * the Adjustment Board."

effect. But this is to be determined in the light of practical considerations. Indeed, the statute, unlike so many outlining quasi-judicial administrative proceedings, does not speak in terms of a "final award." The reference is to "an order of * * * the Adjustment Board." 45 USCA § 153 First (p). The statute does, it is true, prescribe that such an order "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." 45 USCA § 153 First (m). But this is far from saying that to warrant the sanction of a court order, the so-called award of the Adjustment Board must meet all of the rigorous demands of finality as that term is understood in traditional litigation. As later pointed out, this case illustrates why, under a statute enacted to achieve industrial peace in the railroad industry, that congressional aim is thwarted by any such rigid standards.

Under such circumstances we think that this matter—even though cast in terms of jurisdiction or quasi jurisdiction—should be treated as analogous to the problem of determining "finality" for the purposes of certain appellate review. There are instances, undoubtedly rare, in which determination of collateral issues, separable from the main claim, has such operative effect that unless appeal (or here judicial enforcement) is then allowed, the right of review or enforcement will be lost altogether. Relying on *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U. S. 541, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528; *Swift & Co. Packers v. Compagnia Colombia Del Caribe*, 1950, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206; *Sears, Roebuck & Co. v. MacKay*, 1956, 351 U. S. 427, 441, 76 S. Ct. 895, 100 L. Ed. 1297 (concurring opinion), we recently gave effective recognition to these principles in *United States v. Wood*, 5 Cir., 1961, 295 F. 2d 772, 777. Though that appeal was from the denial of a temporary restraining order, not otherwise appealable

under 28 USCA § 1291, 1292(a), we allowed it since under the circumstances of that case it was a determination of "substantial rights of the parties which will be irreparably lost * * *." 295 F. 2d 772, 778.

The record is so far undisputed as to several things which bear directly upon this. First, the Board considers that determination of physical fitness is essential to a final disposition of this grievance. Without prejudging the issue, this seems reasonable—certainly at this stage—if for no other reason than the great public interest in having trains run by workers sound of limb and mind. Second, the Adjustment Board concludes that in this determination medical experts afford the best means of determining the truth. But third, and decisive, the Carrier categorically refuses to participate in any such procedure. There is, thus, a complete stalemate. The Adjustment Board orders one procedure. The Carrier rejects it. Under the statutory scheme the Board has no sanctions of its own. It has no means save the enforcement proceedings under § 153 First (p) to compel compliance.

Thus we think that there was an award of sufficient definiteness to invoke the aid of the District Court in its enforcement. The Court was therefore in error in having dismissed it outright. And to this extent we reject the cases urged by the Carrier and accepted as authoritative by the District Court. *Smith v. Louisville & Nashville R.R.*, D.C. Ala., 1953, 112 F. Supp. 388; *Gunther v. San Diego & Arizona Eastern Ry.*, S.D. Calif., 1958, 161 F. Supp. 295; 1961, 192 F. Supp. 882; 1961, 198 F. Supp. 402. The Court on remand should therefore enter appropriate orders to effectuate the medical examinations and reports for use by the Adjustment Board.

But in so holding we do not think that the award was in such shape that the District Court could proceed to the

hearing and ultimate determination of enforceability on the merits. Again, without indicating any prejudgment, it was certainly permissible for the Adjustment Board to determine physical fitness and utilize medical experts making up the equivalent of a medical arbitration decision. But we do not think that, in the absence of contract provisions establishing such a scheme, the Railway Labor Act has allowed the Adjustment Board by the provisions of an award to commit the ultimate decision of the case to such an outside agency. Congress has committed much to such Boards. Sometimes their decisions are final in an absolute sense, both legal and actual. In others they are final and binding except where there is a money award. And in any case their minimum significance is to serve as prima facie proof to render unnecessary any proof whatsoever in court where the matter is not controverted.[6] With such awesome powers, we do not believe that Congress has intended to commit to the Adjustment Board the power to delegate ultimate judgment on controlling issues to some outside, non-contractual, agency.

Consequently, we think that while it was proper for the Adjustment Board to consider that determination by it of the question of physical fitness would be materially aided by use of the medical arbitration panel, the Board nevertheless had the duty to retain final jurisdiction to evaluate and determine the legal significance of any such medical reports. Under the practices followed in Adjustment Board

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[6] The dissenting opinions in the recent *Day* and *Price* cases, supra, 360 U. S. 548, 554 and 360 U. S. 601, 617, in pointing up the questions of constitutionality of the Act, emphasizes what is they describe as the one-sided nature of judicial review; the employee loses, he has no right of review whatsoever; the employee wins, the carrier loses, the carrier has unlimited review on facts and law. See also, cited therein, Barnett v. Pennsylvania Reading Seashore Lines, 3 Cir., 1957, 245 F. 2d 579; and Brotherhood of Ry. & Steamship Clerks v. Railway Express Agency, 6 Cir., 1956, 238 F. 2d 181.

proceedings where facts are brought forward frequently by informal statements, affidavits, and without sworn testimony subject to cross examination, it is certainly reasonable to resort to this medical panel. It assures that the Adjustment Board will have considered medical expert views based on recent examinations at a time and place convenient to all. It is perhaps a sort of crude adaptation long in advance of contemporary experiments in court use of the so-called independent impartial medical expert appointed by the court.

But with all of this utility, in the very nature of things, the medical panel cannot, and should not, determine the legal issue. In the first place, the conclusion to be expressed by the medical arbiters is a mixture of legal and medical concepts. Equally likely, there is so much uncertainty in each of the concepts, that the ultimate conclusion —even by the majority after calling in the medical umpire —will itself be subject to interpretation. Indeed, this was the problem presented in *Smith v. Louisville & Nashville R.R., supra,* where the District Court held that it was the function of the Adjustment Board to evaluate the equivocal report of the neutral doctor. Such a procedure also assures that when and as the medical arbitration report is evaluated and applied by the Adjustment Board, the enforcing court can then determine the validity of the award based in part on such report. Thus, this determination may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested. After many years of juridical travail, that was the end result in *Gunther v. San Diego & Arizona Eastern Ry., supra,* in the final decision. 198 F. Supp. 402.

Since the award was incomplete to this extent, the question is left as to the action which the District Court should take. The Court dismissed the case without prejudice to further hearings before the Adjustment Board. But we think that this was unduly rigid. It multiplies and complicates litigation in a day when, with overburdened courts facing ever increasing burdens, a prime concern should be in simplifying it. It is after all but one controversy. It is not one grievance today and another one months or years later when the supplemental award is brought before the court in an entirely newly filed action. To refile the case will itself present substantial obstacles. We know firsthand what, in many districts, is the time lag from date of filing until date of trial. There is no real reason why in a proceeding aimed at informality and dispatch, the parties should wait months or years for the refiled case to percolate again to the top of the calendar call. Furthermore, Congress has shown an especial regard for the difference in economic strength of the two protagonists. Court costs are to be borne by the United States and attorney's fees are allowed if the Employee "shall finally prevail." See note 5, supra. As each of the administrative and court proceedings is an essential step toward an award in form which authorizes judicial enforcement, such costs and attorney fees ought not to be imperiled by chopping up a single controversy into two or three separate lawsuits.

Even more important, dismissing the first suit with leave to refile a new one inescapably runs into questions of res judicata, collateral estoppel or the like. Indeed, this added fuel to the fire and time to an almost endless proceeding in the *Gunther* case, supra. See 192 F. Supp. 882. See also F. R. Civ. P. 41 as to dismissals.

On the other hand, the protection of every party, every interest, and every contention, whether legal and factual,

is assured by the court restraining the case in its incompleted state upon its docket pending the filing of a supplemental award by the Adjustment Board. And where this makes sense in the usual case, it is all the more essential where, on our holding, the District Court is here required to retain the case at least to the extent of enforcing compliance with the medical examinations and reports. The language of § 153 First (p) is broad and flexible enough for a District Court to mold equally flexible and sensible procedures. District Courts frequently resort to such measures in administrative agency matters. *Walker v. United States*, W.D. Texas, 1961, 204 F. Supp. 918; 1962, 208 F. Supp. And so may a Court of Appeals. *Aetna Ins. Co. v. Paddock*, 5 Cir., 1962, 301 F. 2d 807; *Cross v. Pasley*, 8 Cir., 1959, 267 F. 2d 824.

The result is that the case must be reversed and remanded for further and consistent proceedings.

REVERSED AND REMANDED.

APPENDIX D

Opinion of National Railroad Adjustment Board, August 6, 1959

National Railroad Adjustment Board
First Division
With Referee Munro Roberts, Sr.

Form 1.

Award 19 287
Docket 35 671

Parties to Dispute:

Brotherhood of Railroad Trainmen.
Atlantic Coast Line Railroad Company.

Statement of Claim:

"Claim of J. H. Hodges, Trainman, Tampa District, for reinstatement with full seniority rights, and pay for all time lost beginning with September 30, 1957, and all subsequent dates until restored to service."

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant (trainman) was injured while on duty January 6, 1955. He suffered compound fractures of the left foot, as a result of which a part of the big toe had to be

removed. He filed suit against the carrier and on December 6, 1956, obtained a judgment against the carrier in the sum of $22,005.28. The carrier satisfied the judgment. On April 29, 1957, the carrier relieved claimant of his rule book and switch key. Within due time the Local Chairman wrote the Superintendent of the carrier protesting the carrier's action and this was followed by a series of letters between the officials of the union and the officials of the carrier. The record is clear that the carrier acted as it did because of the law suit filed by the claimant against the carrier at the time of which claimant testified that he would be unable to perform the duties of a trainman, and his doctor testified to the same effect and also that he had about a forty percent disability. The Superintendent concluded one of these letters by saying: "Under these circumstances Mr. Hodges is no longer in an employe status and his name has been removed from the seniority roster." The record also reveals that the employe produced a somewhat lengthy medical report which is concluded with the following statement: "Mr. Hodges should be employable at any work he wants to do. The foot at the present time is not disabling to him in any way."

The record shows that the General Chairman requested the carrier to set up a board of three doctors to further determine claimant's physical condition.

The union in presenting its side of the case does not so on the theory that the carrier's action in removing an employe's name from the seniority roster and denying him the right to return to work constitutes a violation of the agreement between the carrier and the union.

The carrier in support of its position states: "Carrier readily recognizes that it is not a violation of the agreement for an employe to bring suit against it to recover damages as a result of a personal injury; however, when

an employe alleges permanent disability resulting from the injury and steadfastly maintains that claim throughout the suit and obtains judgment on that contention, he has legally established the fact that he is permanently disabled and the carrier is, therefore, under no compulsion to retain him in the service." The carrier also states: ". . . the position taken by the organization and Mr. Hodges is entirely inconsistent with that which was taken during the trial."

The carrier further states:

"Once an employe has obtained judgment from his employer in the Courts by offering sworn testimony to support his initial position, it is not feasible that he should again be permitted to appear before another tribunal with statement which contradicts his original position for the purpose of establishing against his employer a second claim. The employer is thereby subjected to double jeopardy."

It has been said, and properly so, in many of the awards of this Board that our consideration of a case must be limited to the rules of the agreement and their application to the facts in the case as presented in the docket, which is supplemented by briefs and oral argument. Having this in mind, in the case before us the docket shows that there is an agreement between the carrier and the union which provides, in part:

"(a) A trainman will not be discharged without an investigation." (Art. 31.)

Said rule goes on to provide how such investigation shall be conducted. This is the provision of the agreement before us which we must apply to the facts in the case.

Petitioner contends that plaintiff has been and is being wrongfully withheld from service in violation of the pre-

viously referred to provisions of the agreement between the carrier and the union. In this we must agree, because certainly when the carrier withheld claimant from service it was tantamount to discharging him.

There are awards by this Board where the doctrine of estoppel has been applied. There are others where said doctrine was not applied. This Referee in Award 19 276 (Docket 35 608) refused to apply the doctrine for reasons set forth therein. In the case before us and in others in which this Referee must write the awards we propose to go somewhat further in setting forth our reasons why we cannot apply the doctrine of estoppel.

It has been held that the same rules of res judicata and collateral estoppel apply in an administrative proceeding following a Court judgment that would apply in a second Court action between the parties, but only as to the parties to the record in the Court proceeding.

Let us keep in mind that when an employe brings a cause of action against a carrier he does so under the Federal Employer's Liability Act and the parties to that cause of action are the employe and the carrier. When a claim is presented to this Board it is under the Railway Labor Act and the parties to the claim are the petitioner (the union) and the carrier. Therefore, the parties in the case before us are not the same as the parties in the Court case.

During the oral argument in cases involving the Brotherhood of Railroad Trainmen it was contended that the carrier could not bring charges against claimant and give him a hearing thereon unless the charges were "trumped up". In this we cannot agree. We find that the carrier could have brought charges against the claimant by making the same allegations therein that the carrier now makes. It could have granted a hearing, established a proper record, and there pleaded the doctrine of estoppel and what-

ever other reasons it may have had for refusing to allow claimant to return to work. Had the carrier done so, we would have a different record before us and a different issue or issues to decide. As it is, the only issue we have to decide is whether the provisions of the agreement between the union and the carrier were violated, and we must find that they were.

Had the carrier in settling the judgment claimant obtained against it wanted to foreclose claimant's right to return to work it would have been a simple matter for it to have so stipulated in the stipulation satisfying the judgment.

This is not to say that we have any sympathy for an employe who offers proof to support one position on one occasion and seeks to contradict himself in making a second claim against the same adversary. Nor is it to say that we lack sympathy for the doctrine of estoppel.

Having found that claimant was wrongfully withheld from service in violation of specific provisions of the agreement between the carrier and the union, we further find that claimant is entitled to an examination by the carrier's examining physician to determine whether he is physically able to return to work; that if said physician finds he is unable to return to work claimant may, if he chooses, engage his own physician, and if the latter finds he is able to work, he (claimant's physician) and the carrier's physician shall agree upon a third physician to examine claimant, and the decision of a majority of said physicians as to claimant's ability to return to work shall be binding on the parties hereto. We further find that said physician or physicians shall, if he or they can, determine whether claimant was able to return to work on October 21, 1957, and if he or they find he was able to return to work on said date, he shall receive such earnings as he would have received had he been allowed to return to work on said date.

The carrier Member concludes his brief with a statement that ". . . claimant was working regularly as a carpenter as of September 30, 1957." and urges that if we order the reinstatement of claimant we should do so on the basis that his outside earnings be deducted from any amount awarded him because of being held out of service.

The union contends that this question was not raised by the carrier when the case was submitted to this Board, and, therefore, is not properly before us.

Article 31 of the agreement between the parties, provides in part as follows: "If exonerated he will be paid for the time lost."

Since there is no mention of deduction of outside earnings in the rule, we have no choice but to follow the rule. Therefore, if the physician or physicians find claimant was able to return to work on October 21, 1957, he shall be paid for all time lost since said date.

Award:

Sustained as per findings hereinabove.

NATIONAL RAILROAD ADJUSTMENT BOARD BY ORDER OF FIRST DIVISION.

Dated at Chicago, Illinois, this 6th day of August 1959.

APPENDIX E

Supplementary Opinion of National Railroad Adjustment Board, January 8, 1964

National Railroad Adjustment Board
First Division

With Referee John Day Larkin.

Award 20 389.
Docket 35 671.

Parties to Dispute:

Brotherhood of Railroad Trainmen.
Atlantic Coast Line Railroad Company.

Statement of Claim:

"Claim of J. H. Hodges, Trainman, Tampa District, for reinstatement with full seniority rights, and pay for all time lost beginning with September 30, 1957, and all subsequent dates until restored to service."

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

The history of this case has been outlined in the Findings in Award 19 287. Speaking for the Board, Referee Munro Roberts, Sr., found that claimant Hodges had suf-

fered compound fractures of the left foot on January 6, 1955, as a result of which a part of his big toe had to be removed. During his period of disability, claimant filed suit against the carrier and on December 6, 1956, obtained a judgment in the sum of $22,005.28. This judgment the carrier satisfied without asking claimant to waive or relinquish his seniority rights.

On April 29, 1957, the carrier relieved claimant of his rule book and switch key. In subsequent correspondence with the Local Chairman, carrier's Superintendent made it clear that, because of the suit in which claimant and his doctor had contended that he had suffered a forty per cent disability and would be unable to perform his duties as a trainman in the future, claimant's name had been removed from the seniority roster.

The record also shows that claimant Hodges had obtained a report from Orthopedic Surgeon John E. Gottsch of Tampa, Florida, dated September 30, 1957, which concluded with the following statement:

"Mr. Hodges should be employed at any work that he wants to do. The foot at the present time is not disabling in any way."

The carrier refused the General Chairman's request that a board of three doctors be set up to further determine claimant's physical condition. Being unable to settle this matter on the property, General Chairman Mallard presented Hodges' claim to the First Division under date of April 15, 1958.

In Award 19 287, Referee Roberts found that there was an agreement between the carrier and the union which provided that:

"(a) A Trainman will not be discharged without an investigation." (Art. 31.)

The Board further found that there had been no proper investigation regarding Hodges' physical ability to perform his duties in 1957, at the time the carrier removed his name from the seniority roster. Thus claimant Hodges was held to have been wrongfully held out of service.

The Board's attention was called to the fact that claimant was working regularly as a carpenter as of September 30, 1957, the date of the medical report submitted by Dr. Gottsch.

Referee Roberts made the following observation in his Findings in Award 19 287:

"Having found that claimant was wrongfully withheld from service in violation of specific provisions of the agreement between the carrier and the union, we further find that claimant is entitled to an examination by the carrier's examining physician to determine whether he is physically able to return to work; that if said physician finds he is unable to return to work claimant may, if he chooses, engage his own physician, and if the latter finds he is able to work, he (claimant's physician) and the carrier's physician shall agree upon a third physician to examine claimant, and the decision of a majority of said physicians as to claimant's ability to return to work shall be binding on the parties hereto. We further find that said physician or physicians shall, if he or they can, determine whether claimant was able to return to work on October 21, 1957, and if he or they find he was able to return to work on said date, he shall receive such earnings as he would have received had he been allowed to return to work on said date."

Award 19 287 was adopted August 6, 1959. Carrier refused to effectuate the award, claiming that it was erroneous. As provided by the Railway Labor Act, an enforcement suit was brought in the U. S. District Court, Northern District of Georgia. This Court dismissed the suit on

the ground that the award was in the alternative and was, therefore, too vague to be final and enforceable. Claimant Hodges appealed to the U. S. Court of Appeals, Fifth Circuit. This Court, on November 30, 1962, reversed and remanded the case to the District Court with instructions to issue the necessary mandatory orders requiring the carrier to take the steps required of it in carrying out the medical examination and reports. (J. H. Hodges v. Atlantic Coast Line Railroad, U. S. Court of Appeals, Fifth Circuit, Case No. 19496, November 30, 1962.)

In short, the Circuit Court of Appeals, while recognizing that the medical panel could not make a final determination of the legal issue, ordered steps to be taken to obtain the necessary medical evidence for this Board to render a supplemental award.

In compliance with the decision rendered by the Court of Appeals, the District Court remanded this case to the National Railroad Adjustment Board for a determination by the Board of an appropriate award. At the same time, the carrier was ordered and directed to furnish a physical examination to claimant Hodges by its examining physician on or before February 1, 1963, to determine if Hodges was physically able to return to work on or before October 21, 1957. This order further provided that in the event the carrier's physician and claimant's physician could not agree, a third physician, selected by the two, was to be engaged to examine Hodges. A report of each of the examining physicians was to be submitted to this Board on or before May 1, 1963.

On July 29, 1963, Judge Lewis R. Morgan of the U. S. District Court, Northern District of Georgia, issued Order No. 582, with the following statement:

"The National Railroad Adjustment Board, First Division, shall determine from the reports of the above named

three doctors, plaintiff's physical fitness to return to work for the defendant as a trainman on October 21, 1957, or thereafter. It is further decreed that the Board shall then determine what earnings, if any, the plaintiff would be authorized to receive because of having been prevented from returning to work on said date."

Two of the examining physicians were unable to say whether claimant Hodges was able to return to work in October 1957, since they had not examined him in 1957. The third physician, Dr. Calvin Sandison of Atlanta, Georgia, gave a complete history of the treatment of Hodges from the time he operated on his toe at Piedmont Hospital on June 28, 1955, until the patient was released on October 1, 1957. He also re-examined him on March 2, 1963. It is this doctor's opinion that claimant Hodges was sufficiently recovered by October 1, 1957, to do his regular work. He concluded his statement of March 2, 1963, by saying that: "There is no functional disability resulting from this injury".

All three of the examining physicians now agree that Hodges is able to work. And at least two of them have been willing to say that he was fully recovered by January 29, 1963. The physician selected by the carrier as one of the three who should report to the Court and to this Board, Dr. Joseph J. Ruskin, of Tampa, stated in his report on January 29, 1963, that:

"There is no doubt at the present time that this man is able to work on this foot. The fact that the man has been working since early in 1957 supports this contention. This man has worked chiefly as a carpenter during this time, however, his present job is in the receiving and shipping department of the University of Tampa. He has climbed up and down ladders very well."

Neither Doctor Ruskin, nor the third examining physician, would venture the opinion that Hodges was sufficiently recovered to resume his work as a trainman in 1957.

In conclusion, we cannot find from the statements of the three examining physicians selected in the manner prescribed in Award 19 287 that claimant Hodges was sufficiently recovered to resume his regular duties as a trainman on October 21, 1957. However, it is clear from the record that there has been no valid medical excuse for holding claimant out of service since he was examined on January 29, 1963 by Dr. Ruskin. The report of the third examining physician, Mr. [sic] H. Walker Jernigan, dated June 6, 1963, only confirms what Doctors Sandison and Ruskin had already made clear in their earlier statements. Claimant is physically able to resume his duties; he has been physically able to return to work at least since January 29, 1963.

As a supplemental award to that approved by this Board August 6, 1959, Award 19 287, we find that:

(1) Claimant is able to resume his duties.

(2) The medical evidence indicates that he should have been restored to service no later than January 29, 1963.

(3) He shall be paid for all time lost since January 29, 1963.

Award:

Claim sustained as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD BY ORDER OF FIRST DIVISION.

Dated at Chicago, Illinois, this 8th day of January 1964.

APPENDIX F

Section 3 *First*, paragraphs (a), (h) (in pertinent part), (j), (k), (l), (m), (n), (o), (p) and (q), of the Railway Labor Act

(NOTE: The statutory material is shown in composite form to illustrate the amendments made by Public Law 89-456, 80 Stat. 208, approved June 20, 1966. Material deleted by that act is shown in square brackets [ ]; material added is shown in *italics*.)

SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

• • •

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom

shall be selected and designated by the national labor organizations of the employees.

* * *

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute [except insofar as they shall contain a money award]. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. *In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.*

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States

shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board [shall be prima facie evidence of the facts therein stated,] *shall be conclusive on the parties,* and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.*

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file

in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

Case No. 714

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

J. H. HODGES and BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents.

BRIEF OF J. H. HODGES AND BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ATLANTIC COAST LINE RAILROAD COMPANY

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QUESTIONS PRESENTED

(1) Do the provisions of Section 3, First, of the Railway Labor Act (45 U.S.C.A. 153, as amended specifically by Public Law 89-456, 80 Stat. 208 (1966) permit the railroad to assert the defense of equitable estoppel against an enforcement of an award rendered by the National Railroad Adjustment Board?

(2) If the above issue is answered in the affirmative, which respondents contend it should not, can the carrier urge as a defense equitable estoppel where the National Railroad Adjustment Board held it was

not a proper defense because the carrier did not properly raise it in administrative proceedings in compliance with the contract between it and the Brotherhood of Railroad Trainmen?

(3) Is an award of the National Railroad Adjustment Board which is valid on its face final and binding as to all findings of fact and law pertaining to a claim submitted to it and over which the Board has jurisdiction?

STATEMENT OF FACTS

Respondents do not agree with the statement of facts set forth in the petition for a writ of certiorari and wish to add other very pertinent facts.

Additional Facts

In December of 1956, at the trial of this case in the plaintiff's suit for damages against the carrier, the following pertinent evidence was given by the plaintiff:

(R. 55)

"Q. . . . do you feel that you can do this work with your foot?

A. No, sir."

Respondents contend that this question and answer related to the present tense, and petitioner did not state that he could not do this work in the future (R. 55).

Dr. Allgood testified (R. 58):

"Q. Do you think he will be able to climb up and down moving box cars or jump off and on moving cars?

A. I don't think so. I wouldn't recommend it to him. He might be able to do it a few times and get by with it, but I doubt that he would be able to do it as a routine thing.

Q. Now, your appraisal of disability; I believe you said 40% disability of the toe, is it not?

A. No, that is of the foot as a whole.

Q. Foot as a whole?

A. Leg as a whole.

Q. But so far as employment is concerned, he would be disabled for such employment, or not disabled, depending on what that employment would be, is that correct?

A. Depending on what he is able to do. If you will remember, I gave that disability for average manual labor. For example, he might be very slightly disabled for doing office type work.

Q. Or even for doing manual labor which enabled him to sit at a bench or operate a machine?

A. That's right; but probably even higher than 40% for doing the work he was doing.

Q. But for standing work —

A. For work that required standing and using the foot during the entire time he is on duty, he might be 100% disabled from doing the work he was doing previously, but based on the amount of pain and the other things that I have mentioned, for what I would say average manual labor, it is based on that."

In plaintiff's damage suit, Dr. Allgood, who testified for plaintiff, was asked:

> (R. 58):
> "Doctor have you formulated from your examination of Mr. Hodges any idea of what percentage of disability you feel that he is suffering *now* as to his foot as a whole?" (Emphasis supplied)

The doctor's testimony at all times related to the plaintiff's present disability. He was never asked to express an opinion as to any future disability, nor was he asked to express an opinion as to how long the plaintiff would be disabled.

The award of the National Railroad Adjustment Board reveals (R. 14):

After the trial of J. H. Hodges' suit, a verdict was rendered for $22,005.28 on December 6, 1956. (The actual amount sued for was $75,000.00). On April 29, 1957, the carrier relieved Hodges of his rule book and switchkey without any notice of investigation, or investigation, in compliance with the contract. The Brotherhood protested to the carrier that Hodges had been removed without the carrier complying with Article 31(a) of the contract between the carrier and the Brotherhood. After some correspondence, the Brotherhood was informed that the plaintiff was no longer an employee and that his name had been removed from the seniority roster. Thereafter, the Brotherhood filed a claim with the National Railroad Adjustment Board alleging that the action of the carrier in removing Hodges' name from the seniority list and

denying him the right to return to work, or even the right to have a physical examination to determine his ability to return to work, constituted a violation of the contract agreement between the carrier and the Brotherhood, to-wit, Article 31(a), as follows:

> "A trainmen will not be discharged without an investigation."

At the hearing before the Board, the carrier contended that since Hodges had brought suit against it and recovered for permanent injuries, the carrier was under no compulsion to retain Hodges in its employment, and Hodges was estopped to claim he should be retained in its employment. The Board refused to apply the doctrine of estoppel for two reasons (R. 14):

(1) That the carrier could have brought charges against Hodges, had an investigation under Article 31(a) of its contract with the Brotherhood, proved the facts of disability and of the damage suit, and pleaded estoppel as to Hodges; and if they had done so, the Board would have had this issue before it. *But, since they did not do this,* the only issue before the Board was: Did the carrier violate its contract with the Brotherhood by not having an investigation as required by Article 31(a) and refusing to retain Hodges in its employment (R. 14).

(2) That since the parties were not the same, an estoppel against Hodges (if such there was) could not be urged as a defense against the Brotherhood (R. 14).

The Board found that Hodges had been released from his employment in violation of Article 31(a) of the contract between the parties (R. 14).

REASONS FOR DENYING THE WRIT OF CERTIORARI

(1) The only grounds on which an award may be set aside are enumerated in Public Law 89-456, and the Congress, by this amendment to the Railway Labor Act, has made the award of the Board final and binding as to all parties except in those specified exceptions. Since the grounds set forth in petitioner's application for the writ plainly show they do not come under the provisions authorizing the setting aside of an award, the writ should be denied.

The grounds for setting aside an award are here set out in substance:

> (a) A failure of the division to comply with the requirements of this Act.
>
> (b) For failure of order to conform or confine itself to matters within the scope of the division's jurisdiction.
>
> (c) For fraud or corruption of a member of the division making the order.

Congress, in passing the Railway Labor Act and setting up the Board, intended a speedy end to disputes between carriers and their employees, as a reading of the Congressional reports shows, and this case is an excellent example of what the act was passed to prevent. The record shows that this case has been in

dispute or litigation for over nine years, and the carrier is still trying to relitigate issues decided by the Board, which Congress intended to be final and binding on both parties.

(2) In argument on question number (2), it is our position that the carrier deliberately violated its contract with the Brotherhood and in effect "took the law in its own hands", and when a claim of such violation was made against it, tried to plead that Hodges was estopped by a recovery in his damage suit. If the carrier had complied with its contract, the issue of whether or not Hodges was permanently disabled from railroading and the question of estoppel could have been investigated and such issues would have been before the Board. Since the carrier did not comply with its contract, the Board was correct in holding that estoppel was not before it.

In *PEACOCK v. WALKER*, 213 Ga. 628 (100 S.E.2d 575), the court said:

> "If a party has a good defense at law, and from negligence fails to set it up at the proper time, he must suffer the consequence of his own laches. . ."

Both carrier and Brotherhood are obligated to comply with the contract.

In *BELK v. ALLIED AVIATION SERVICE CO. OF NEW JERSEY, INC.*, 315 F.2d 513, certiorari denied 84 S.Ct. 1343, 377 U.S. 937, 12 L.Ed.2d 301, citing on page 517 from *Drake Bakeries, Inc. v. Local 50, American*

Bakery & Confectionery Workers, 370 U.S. 254, 82 S.Ct. 1346, 8 L.Ed.2d 474, the court stated:

> ". . . There the company action for breach of a no-strike provision was dismissed, the Court holding that arbitration of this alleged breach was a prerequisite to suit. . ."

Since the employer did not proceed under the provisions of the contract, appellant contends that a failure to offer a defense which could have been urged in such administrative proceedings prior to the Board hearing was a waiver of such defense.

The carrier in this case is attempting to indirectly do what *GUNTHER v. SAN DIEGO A.E.R. CO.*, 382 U.S. 257 (1965) says cannot be done by asking this Court to go into the merits of the award of the Board.

(3) With reference to the third question presented, it is our position that the carrier is also asking this Court to review a challenged ruling of law made by the Board based on the facts of the case. The Fifth Circuit Court of Appeals has made a ruling in a similar circumstance in the case of *SIGFRED v. PAN AMERICAN WORLD AIRWAYS*, 230 F.2d 13 (4), 17, as follows:

> "In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore . . . we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of

its proceeding. *James Richardson & Sons v. W. E. Hedger Transportation Corp.*, 2 Cir., 98 F.2d 55."

The case cited in the Fifth Circuit Court's opinion above is especially applicable to this case since the Supreme Court has held that the "Adjustment Board's provisions were to be considered as 'compulsory arbitration in this limited field'" and we quote from headnote 3 of the cited case:

> "The Circuit Court of Appeals cannot amend or overrule award of arbitrators merely because of disagreement with matters of law or facts determined by the arbitrators."

We call the Court's attention to certain Committee Reports of Congress which clearly show the intent of Congress in passing Public Law 89-456:

Senate Report No. 1201 — 89th Congress, 2nd Session, accompanied H.R. 706, Public Law 89-456, passed by the House February 9, 1966, by the Senate June 7, 1966, and approved June 20, 1966, amended 45-153, and struck from Section 3, First, (p), of such act, the words:

> "shall be prima facie evidence of the facts therein stated"

and inserted in lieu thereof:

> "shall be conclusive on the parties."

Thus judicial review was eliminated except as to a limited review.

The purposes of the bill are set out in the report on pages 1, 2 and 3, as follows:

"Purpose"

"The principal purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, to expedite disposition of grievances and disputes over the interpretation and application of agreements, and to provide equal opportunity for limited judicial review of awards of the Board to employees and employers."

"Judicial Review"

"Under Section 3, First, (p) of the act, provision is made for court enforcement of awards rendered in favor of employees. Such an employee may bring action in the U. S. District Court to enforce said award. The findings and orders of the Board shall be prima facie evidence of the facts as stated in the award. There is no other provision for judicial review of decisions of the National Railroad Adjustment Board.

"This results in the incongruous situation that if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by

declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review might be obtained. The committee believes that this result is unfair to employee and that an equal opportunity for judicial review should be provided under the act. Also, because the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be limited to those grounds commonly provided for review of arbitration awards. H. R. 706 provides an equal opportunity for judicial review and limits that review for 'failure of the division to comply with the requirements of this act, for failure of the order to conform, or confine itself to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.' ".

We do not feel that the Court should consider the merits of petitioner's argument that Hodges was estopped by his recovery in the damage suit since the carrier did not raise the issue at the proper time and place, but we do wish the Court to know that we contend Hodges was *not* estopped since he did not allege he would never be able to work on the railroad and all the evidence related to present disability and none to any future disability.

CONCLUSION

It is very obvious in any personal injury claim that a man can have a permanent disability of a member of his body without actually being totally and permanently disabled from railroading. It will be noted that the plaintiff did not claim in his suit that he was totally and permanently disabled from railroading. He merely stated that his injuries were permanent in character. A man could lose an ear, which would be a totally and permanently disabling injury, but would not necessarily totally and permanently disable him from railroading. This is also true in the instance of men who have lost fingers and who are still working for the railroad. It is common knowledge that in times past the railroads have permitted men to work with one eye, although this practice is not generally followed now because of safety reasons. Further, a man who is employed by the railroad can be totally and permanently disabled from performing the work of a switchman, but would not necessarily be totally and permanently disabled from performing the work of a passenger conductor or a through freight conductor. Therefore, claimant's petition could not be urged as an equitable estoppel under any circumstances because neither the plaintiff's petition nor the evidence shows that the plaintiff was totally and permanently disabled from railroading. This, we urge and insist upon even though we contend we are perfectly correct in our interpretation of the *Gunther* case, that the award of the National Railroad Adjustment Board is final and binding and cannot be disturbed.

Further, Public Law 89-456 clearly limits the jurisdiction of federal courts to the enforcement of ad-

justment board awards except as to the three limited issues provided in that law; that Congress has clear authority to limit the judicial review of administrative determinations even while such determinations are before the courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been furnished to counsel of record for petitioner for writ of certiorari, by depositing a copy of same in the United States Mail, with sufficient postage thereon, this _____ day of _____, 1966.

SAM D. HEWLETT, JR.
Attorney for Respondents

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

1. Most of the respondents' Brief in Opposition consists of an attempt to litigate on its merits in this Court the defense of estoppel which petitioner has sought to assert. We shall not join respondents in this effort; our position is simply that the Adjustment Board should have permitted petitioner to have had the defense of estoppel considered on its merits before it, and that its refusal to do so was the sort of action which was open to correction by the Federal courts in the judicial review proceedings—however limited those judicial review proceedings might be.

Certainly there can be no question, despite the extremely selective statement of facts supplied by respondents, that respondent Hodges claimed, and submitted proof on, a permanent disability in his FELA suit. His complaint claimed that he was and is "totally and permanently dis-

abled from railroading."[1] (R. 68) It is hard to see why he should not be taken at his word. Neither is it true, as claimed (Br. in Opp. 2-4), that there was no medical evidence in support of this claim at the trial. Hodges' physician testified: "I doubt that he [Hodges] will ever be able to return to the type railroad yard work that he once did." (R. 58) Hodges also supported his contention with his own evidence of permanent disability. (R. 55) Moreover, Hodges introduced mortality tables into evidence; obviously these relate only to a permanent disability; and the court charged the jury on permanent disability and on the use of the mortality tables which Hodges had introduced. (R. 61-63) To say now that Hodges—a trainman—was not permanently disabled because he could have been assigned sedentary work (Br. in Opp. 3) is to ignore the facts of life in the railroad industry; there is no showing that Hodges had any seniority or qualification for any such work or that his craft in any way related to it. Despite these suggestions of the respondents, it is clear that there was created an occasion for the Adjustment Board to have considered whether the railroad had established an estoppel against Hodges on the basis of his FELA verdict on his permanent disability claim.

2. Despite the assertion of respondents, petitioner is not attempting to obtain judicial review of the Adjustment Board's rulings on a question of law (Br. in Opp. 8-11), or "trying to relitigate issues decided by the Board." (Br. in Opp. 7) Rather, petitioner is attempting to have the federal courts require the Adjustment Board to pass

---

[1] In the light of this we are baffled by respondents' assertion that "plaintiff did not claim in his suit that he was totally and permanently disabled from railroading." (Br. in Opp. 12) This assertion flatly contradicts the record.

on and decide a legal defense which petitioner has tendered and which the Board has refused to consider. The Court of Appeals recognized (Pet. App. 10a-11a) that the action of the Adjustment Board in not considering the claim of estoppel was without foundation. Yet it declined to do anything about this, and instead ordered the District Court to enforce the award which had been made on this basis. It is this precise point which we are seeking to have this Court review, since it represents an abdication of all judicial review over the Adjustment Board's rulings.—While we cannot agree with respondents (Br. in Opp. 9-11) that Public Law 89-456 is applicable to awards rendered before its passage, nonetheless, as we pointed out in the Petition for Certiorari (Pet. 16-18), even if Public Law 89-456 were applicable, its legislative history makes it plain and confirms that the federal courts are to "have the power to decline to enforce an award which was actually and indisputably without foundation in reason or in fact." S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 3. It is precisely in this category that the Adjustment Board's action here, in declining to consider a meritorious defense, falls.

3. Finally, the respondents claim (Br. in Opp. 4-5, 7-8) that the Adjustment Board declined to consider the defense of estoppel because the petitioner had not afforded Hodges an "investigation" under the Union contract; apparently it is suggested that somehow this was a failure to exhaust the petitioner's remedies and that the failure to afford Hodges an investigation precludes the petitioner from claiming estoppel. But on its face the Adjustment Board's award (Pet. App. 30a-31a) does not proceed on this basis; it is based simply on the alleged nonidentity of parties as between the FELA suit on the one hand and the proceeding before the Adjustment Board on the other. Secondly,

the Adjustment Board made it perfectly plain that it did not view the issues before it as limited to whether the petitioner was in the wrong in not affording Hodges an investigation; for the Adjustment Board expressly held that Hodges could not return to work until a factual determination was made that he was "physically able to return to work" (Pet. App. 31a); for the determination of this issue, the Board from the start ordered a physical examination, and then later, as required by the first opinion of the Court of Appeals, itself made a factual determination of Hodges' physical condition. (Pet. App. 37a-38a) But Hodges' physical condition was the very issue to which the claimed estoppel related. As the respondents point out (Br. in Opp. 7), if their theory were correct as to the basis on which the Board is claimed to have refused to consider the estoppel, the issue of whether Hodges were disabled would not have been before the Board; but clearly it was, as the Board itself recognized by ordering the physical examination. Accordingly, it is plain that, as the Court of Appeals found, the Adjustment Board was without justification in refusing to consider the claim of estoppel on its merits—either on the ground which respondents now seek to ascribe to the Board, or on the Board's stated grounds, by which its decision must be judged.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Reply Memorandum, the Petition for Certiorari should be granted.

Respectfully submitted,

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